APPEAL NO. 93401

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp 1993). On April 22, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent (claimant) was injured compensably and has disability. Appellant (carrier) asserts that claimant was acting outside the scope of his employment in activating a saw.

DECISION

Finding that the decision and order are sufficiently supported by the evidence, we affirm.

Claimant began work for a metal working company (employer) on October 1, 1992, and was injured on (date of injury). He was hired to clean in the fabricating area of the plant. On (date of injury), claimant arrived at work and performed cleaning duties. Claimant vaguely remembers going to get a replacement blade for a machinist, but does not remember the accident or how it happened. One worker, (JJ), who was painting nearby, heard the chop saw come on because it is loud; he then heard a loud metal on metal sound which attracted his attention, and he turned. He added, "out of the corner of my eye, I had caught a glimpse of him falling." Claimant was lying in a pool of blood with a large gouge and cut on his head. Claimant testified that his left arm now hurts and that he cannot pick up items with his left hand. The hearing officer commented about the time claimant took to answer questions, and the claimant observed that he had not required so much time prior to the accident.

Claimant testified that although he was hired to clean, "B" taught him to cut material. In addition, he had helped "T" change the blade on the saw in question several times; T is no longer an employee. Claimant said that the foreman had not told him to change the blade on that saw, but in the past had asked Tony to get claimant to help T change it. He said that he was told he could use other saws, such as one that cut "angles" and one that cuts "sheets" of metal. He helps others when they are running the machines.

(Mr. B) testified that he hired claimant to work as a cleaner. He told him "not to use anything unless he was, you know, with someone that had set it up for him or had instructed him in how to use it." He added that mechanics in the shop would ask for claimant's help. He said that while a helper could possibly change a blade on a saw, the machinist would be there and would change it himself--it is a part of the machinist's job. Helpers do go to get blades for machinists, though. Mr. B had not authorized a helper to change a blade.

(Mr. BA) is the shop foreman. He stated, "I told him one time not to use the big shear, not to use any of the equipment until he was instructed on it." He said claimant's duties did not include using the machines or changing blades on them. He said that there

is a wrench that is kept on a hook by the chop saw that is used only to turn a nut when the blade is changed; that wrench was lying approximately 10 to 15 feet away from the saw when claimant was hurt. Mr. BA is of the opinion that claimant tried to change the blade, that the wrench did not easily turn the nut and that the saw was turned on to boost the pressure of the wrench on the nut. (He stated that the blade should be lowered and held in place with a piece of metal to get tension with the wrench, otherwise the blade spins as the wrench is applied.) The speed of the saw would whip the wrench away from one's grasp and could hit a person in the head. Mr. BA acknowledges that he did not tell claimant to stop using the shear the first time he saw him use it, but told him to stop after having heard that claimant had not been trained to use it. He agreed that claimant was allowed to get items for mechanics. Mr. BA said that a mechanic, (Mr. Z), told him that just before the accident claimant offered to find a better (new) blade for his use on the chop saw and Mr. Z told him if claimant could find a new blade, he would change it. Mr. BA pointed out that Mr. Z did not ask claimant to get another blade, testifying, "I don't think he really asked him to get another one. He said if you can find one, I'll change it." He described the "on" switch for this saw as encased in a collar so that a digit had to be precisely directed to press it; no careless brushing would depress the start button.

Mr. Z testified that the chop saw uses an abrasive blade that wears down as it is used so that the circumference of the blade may become too small to cut through the material being cut. He said that when he changes a blade, he holds the blade down with the guard in the up position, and then tightens the nut that holds the new blade. (The guard comes down when the saw is started.) Mr. Z is a big man and he tightens the nut very tightly, having changed a blade on this saw just prior to claimant being injured. He did not know that anyone gave claimant permission to use the saw. He agreed that claimant had offered to find a better blade. After Mr. Z had agreed that a better blade would be useful, he got on the forklift to get more material to cut. Shortly, he turned without being startled (the forklift makes noise, too) and saw claimant lying in front of the saw, which was running with the guard up. He did not see the accident. He believes claimant tried to loosen the nut but could not and turned on the machine to help twist it loose, the wrench jerked around hitting him on the top of the head, knocking him down into the saw. He has never seen anyone try to loosen a nut by holding a wrench to the nut and turning the machine on; he would not try it. He had left the guard in the down position when he went to use the forklift. Mr. Z saw the wrench that is used for changing blades laying on the floor several feet away but did not see another replacement blade that claimant supposedly had found. He also saw no metal that claimant may have been trying to cut. Mr. Z "assumed" what happened to the claimant. Mr. Z identified a picture of a sign that hangs on a machine in the shop that says "no one is to operate equipment unless shop foreman has approved work. Weekends and after hours are no exception." He has not noticed such a sign on the saw in question.

JJ further testified that after he heard the metal on metal sound and saw claimant lying in blood, he turned off the saw. The guard was up off the blade, and the saw was in

the up position.

(Mr. Bl) is the president of the company. He never gave claimant permission to use the machines. He believes the wrench caused the hard blow to claimant's head. The wrench is case hardened so it has no marks on it from striking some other metal object. He does not know of anyone who saw the incident occur. He said that claimant in the past has argued with other workers who told him to do something.

Carrier asserts that violations of instructions that limit the scope of employment remove a worker from the scope of employment. Distinction is made between violations relating to the manner of doing one's work, which does not remove a worker from the scope of employment, and violations of instructions that limit the scope of work. The case of Maryland Cas. Co. v. Brown, 131 Tex. 404, 115 S.W.2d 394 (1938) is cited. This case involved a salesman who went to Mexico after being told not to do so. The court therein discussed the affect of violations of instructions as to manner as opposed to violations of instructions as to scope. Carrier also cited Quarles v. Lumbermen's Reciprocal Ass'n., 293 S.W. 333 (Tex. Civ. App.-Beaumont 1927, no writ), which was an affirmance of a factual finding that claimant was not in scope of employment at the time of his injury. In Quarles, claimant worked in a planing mill and was not to go into the other department, a box factory, without permission. His injury was suffered in the box factory. The appellate court found sufficient evidence to support the jury findings. More recently, when the details of an accident were unknown, Masuccio v. Standard Fire Ins. Co., 770 S.W.2d 854 (Tex. App.-San Antonio 1989, no writ) reversed a summary judgment, saying that it was a fact issue when an employee was found dead several hours after the end of a business meeting at a point removed from both the business and her home.

The hearing officer is the fact finder and Article 8308-6.34(e) of the 1989 Act declares him to be the sole judge of the weight and credibility of the evidence. The hearing officer found that claimant had been told not to use the shear machine but had not been told not to change a chop saw blade. Testimony of Mr. BA made it clear that he did not stop claimant from using the shear machine the first time he observed him using it because he did not know whether someone else had instructed him in its use. This shows that the foreman was not required to first instruct and then permit a worker to use a machine--others could do it. When Mr. BA found out that no one had instructed claimant, then he stopped his use of the shear. No one said that he told claimant not to change a chop saw blade. Neither Mr. B nor Mr. BA testified that they instructed claimant never to use the machines, but each spoke of provisos to usage, which are subject to interpretation; neither required claimant to check back with him after "instruction" but before usage. There was no evidence that claimant had attempted to cut any metal at the time of the accident, but claimant testified that Brian taught him how to cut material. (One employee was named Brian, but he did not testify.) In addition, claimant testified that he had helped Tony change blades on the saw in question several times before. The hearing officer, as finder of fact, had sufficient

evidence upon which to make these findings, just as did the fact finder in Quarles, although the result was different. Both in Brown and Quarles, we observe that the claimant in question went from an authorized place to an unauthorized one; in the case on appeal, the claimant was working in an authorized area.

Carrier also takes issue with the finding in regard to disability saying that claimant's testimony is insufficient to support his burden of proof. Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992, indicates that lay witness testimony can sufficiently support a determination of disability. No doctor's record or statement was introduced indicating that claimant has been released to return to work. *See* Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991.

The findings of fact and conclusions of law are sufficiently supported by the evidence. *See* Westchester Fire Ins. Co. v. Wendeborn, 559 S.W.2d 108 (Tex. Civ. App.-Eastland 1977, writ ref'd n.r.e.). The decision and order are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge